Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1665

JERSEY CENTRAL POWER & LIGHT COMPANY, *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*

ALLEGHENY ELECTRIC COOPERATIVE, INC., *Intervenor*

BOROUGHS OF MADISON, BUTLER, LAVALLETTE AND SEASIDE HEIGHTS, NEW JERSEY, *Intervenors*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF INTERVENOR ALLEGHENY ELECTRIC COOPERATIVE, INC. IN OPPOSITION

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OPINIONS BELOW

The initial opinion of the Court of Appeals is set forth as Appendix A attached to the Petition and its opinion denying rehearing is set forth as Appendix B to the Petition. The orders of the Federal Energy Regulatory Commission which were reviewed by the Court of Appeals are set forth as Appendices F and

G, respectively, to the Petition. Other orders of the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission, relating to this proceeding are set forth as Appendices C, D, E, and H of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the Federal Energy Regulatory Commission err in rejecting Petitioner's proposed "phase-in" of its fuel costs adjustment clause through summary disposition as constituting retroactive ratemaking, and as a violation of the filed rate doctrine?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are adequately set forth in the Petition, and are attached thereto as Appendix J.

STATEMENT

This proceeding was initiated before the Federal Power Commission[1] by Petitioner, Jersey Central

[1] On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DoE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of the Department of Energy, and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. All references herein to the "Commission" shall be to the Federal Power Commission for the period prior to October 1, 1977 and to the Federal Energy Regulatory Commission for the period commencing October 1, 1977.

Power & Light Company, filing with the Commission on July 27, 1976, a proposed wholesale rate increase of $1,201,462 for service to its wholesale customers. On August 26, 1976, the Commission accepted the filing, suspended its operation for one month, and established procedures for determining the lawfulness and reasonableness of the proposed increase.

The Commission permits public utilities under its jurisdiction to include in rate tariffs filed with it a fuel cost adjustment clause providing that there be added to (or subtracted from) the base energy rate provided for in the tariff an amount reflecting the increase (or decrease) in the cost of fuel provided for in the base energy rate which has occurred subsequent to the fixing of the base energy rate. Because the fuel cost figures for the billing month are not available at the time of billing, usually the fuel adjustment clause will use the costs for an earlier month, or months, and apply such costs to the billing month kilowatt hours sold in the billing month.

Included in the Petitioner's filing was a base energy rate of 2.0 cents per kWh. The base energy rate was designed to recover fuel costs of 14.433 mills per kWh, which was the estimated base cost of fuel for calendar year, 1976, as shown on Statement O of the filing. The base cost of fuel in the previously existing rate was 5.659 mills per kWh which reflected the fuel cost level in 1972. Both the old fuel clause and the new fuel clause provide that the fuel adjustment factor is to be applied to kWh used by the customer *in the billing month*. In

both the new and previous fuel adjustment clauses, the fuel adjustment factor is calculated as the difference between the base cost of fuel and the cost of fuel in the current period, defined, by Petitioner, in both clauses as the average cost of fuel in the three month period ending with the second month preceding the billing month. Thus the filing had no effect on the total amount to be recovered in any month under the fuel clause, the combination of the base rate and the adjustment factor. Dollars were merely shifted from the adjustment factor to the base rate.

Thus, Petitioner continued to use the fuel costs actually incurred during the first three months of the prior four month period to impute the fuel costs included in the bills rendered for the billing period.

As shown above, in both the new and previous fuel adjustment clauses of Petitioner, the fuel adjustment factor is calculated as the difference between the base cost of fuel and the cost of fuel in the current period, defined as the average cost of fuel in the three month period ending with the second month preceding the billing month. Thus, the rate increase filing by the Petitioner had no effect on the total amount to be recovered for fuel in any month under the combination of the base rate and the adjustment factor. Dollars were merely shifted from the adjustment factor to the base rate.

However, Petitioner claimed, in its filing, that on the effective date of the proposed rates, it would have "incurred fuel costs above the base cost in the present clause which have not been recovered because of the billing lag." (R. 2, 459). Thus, Petitioner proposed to recover under the new tariff an amount which it

claimed was left unrecovered under the old rates due to the billing lag which was left unchanged in Petitioner's filing. Petitioner chose to attempt recovery of the claimed unrecovered fuel costs through the mechanism of a "phase-in" whereby customers would be billed, starting in the first billing month under the new tariff, for the raised, 1976 level base cost of fuel of 14.433 mills per kWh, but the adjustment factor would be calculated on the basis of the old 1972 level base cost of 5.659 mills per kWh. Gradually, over a period of five months, the base cost used in the adjustment factor would be raised to the 14.433 mills per kWh. In its Letter of Transmittal accompanying the filing, Petitioner claimed that its use of a phase-in to recover claimed unbilled fuel costs was based on the same theory as and differed only in form from fuel adjustment surcharges requested by other companies such as Public Service Company of New Hampshire ("PSNH").

In Opinion No. 790, *Public Service Company of New Hampshire,* 19 PUR 4th 210; rehearing denied Opinion No. 790-A, Docket No. ER76-285 (May 20, 1977), the Commission affirmed an Initial Decision by an Administrative Law Judge which rejected PSNH's attempt to collect through a new tariff fuel revenues which PSNH claimed were uncollected by its previously effective tariff. The Commission agreed with the Judge that any such attempt was unjust and unreasonable as constituting retroactive ratemaking. (Op. 790 at 3-4, 11-15).

By Order issued October 25, 1977 (set forth as Appendix F to the Petition), the Commission granted Motion for Summary Disposition of the fuel adjustment clause phase-in issue in this case.

In its order, the Commission held that there were no factual matters in dispute, and that, as Petitioner itself, had argued, the phase-in was identical to the proposed surcharge found illegal in Opinion No. 790. The Commission concluded:

> "Our determinations in Public Service Company of New Hampshire and in the subsequent surcharge cases were based on the filed rate doctrine and on the Federal Power Act proscription of retroactive rate making. The factors set out there are equally applicable to this proceeding, and we do not believe it is necessary for the hearing in this matter to consider Jersey Central's proposed phase-in." (Order Granting Motion For Summary Disposition, October 25, 1977, mimeo p. 14) (footnote omitted).

The Court of Appeals affirmed the Commission's grant of summary disposition. The opinion is attached as Appendix A to Petitioner's Brief.

ARGUMENT

The Petition fails to establish grounds which would warrant review by this Court on *Certiorari*.

We should first point out that the Petition erroneously states the "Question Presented". The Petition refers to the tariff provision at issue here as "a just and reasonable electric utility tariff provision." The record is lacking any evidence tending to establish that the tariff provision in question is "just and reasonable".

The "Question Presented" also refers to the tariff provision as seeking "to recover for monies spent to purchase fuel consumed in generating electricity, where

the monies were spent before the tariff's effective date, but the fuel costs to be recovered are properly allocated as cost to the billing months occurring after the tariff's effective date."

As found by both the Court of Appeals and the Commission, and as is readily discernable from a reading of the tariff, such fuel costs are *not* properly allocated as costs to billing months occurring after the tariff's effective date.

I. The Court of Appeals' Decision Is Clearly Correct

The Opinion of the Court of Appeals carefully analyzes the orders of the Commission being reviewed and impartially considers in detail the arguments advanced before it and to the Commission by Petitioner. It correctly concludes that the resolution of the issue before it depends solely upon an interpretation of the tariff provisions which became effective in 1973 and remained in effect until 1976. As the Court of Appeals and the Commission found, that tariff provided that in the billing month the wholesale customer would be billed for the kilowatt hours used during the billing month. The fuel adjustment factor to be applied to such sales would be based on the actual costs for fuel for a three month period ending two months prior to the billing month.

The Petition contends that the Court of Appeals ignored the Commission's own explanation of its decision and in support of that argument quotes the following comment by the Commission in one of its orders:

> " 'Our determinations in Public Service Company of New Hampshire and in the subsequent sur-

charge cases were based on the filed rate doctrine and on the Federal Power Act proscription of retroactive rate making. The factors set out there are equally applicable to this proceeding and we do not believe it is necessary for the hearing in this matter to consider Jersey Central's proposed phase-in. (footnote omitted).' "

[pp. 9-10].

The Petition then asserts:

"Instead of reviewing the decisional basis, the Third Circuit relied exclusively on its construction of the 1973 tariff. The consequent rejection of the Commission's rationale acts to substitute judicial judgment for a deficient administrative judgment. . . .

"The Court's construction, by itself, provides no legal basis for disapproving the phase-in provision of Jersey Central's tariff. Without such a basis, the Third Circuit's decision falls of its own weight."

[p. 10].

These are most certainly fallacious statements as the Court of Appeals most certainly reviewed the decisional basis and placed the identical construction on the 1973 tariff as had the Commission. The Court clearly indicated what the Commission had done and approved it after carefully analyzing the 1973 tariff. The Petitioner's phase-in provision constitutes retroactive rate making in the opinion of both the Commission and the Court of Appeals because of the rates set forth in the 1973 tariff.

The Petition argues that the Commission and the Court of Appeals unduly expands the rule against retroactive rate making. This is a baseless argument.

Both the Commission and the Court of Appeals merely apply the rule against retroactive rate making in its most simple form.

The Petitioner's proposed phase-in is patently retroactive rate making because it applies to a period of time prior to the effective date of the surcharge. Here we are unquestionably involved in a rate making procedure. Put the two facts together, the proposed phase-in would, if granted, clearly constitute retroactive rate making.

The Federal Power Act explicitly prohibits retroactive rate changes other than the refunds required by Section 205 of the Act. Under Sec. 205(d) a public utility may change its rates only after 60 days notice to the Commission. Moreover, under Sec. 206, the Commission can establish rates to be charged only after the date of the Commission Order establishing such rates. Over and over again, the courts have held that the Act forbids a public utility to recover past losses in future rates. It similarly forbids customers from retrieving excesses charged in the past. *Montana-Dakota Utilities* v. *Northwestern Public Service Company,* 341 U.S. 246, 254, 258 (1951); *Indiana & Michigan Electric Co.* v. *FPC,* 502 F.2d 336, 344 (1974); *Shell Oil Co.* v. *FPC,* 334 F.2d 1002, 1009 (1964); *FPC* v. *Hope Natural Gas Co.,* 320 U.S. 951, 618 (1944).

The United States Court of Appeals for the District of Columbia Circuit has held that such an attempt "runs afoul of the established ratemaking principle which precludes a utility from charging higher fares in the future in order to recoup past losses." *Payne* v. *Washington Metropolitan Area Transit Commission,*

415 F.2d 901, 910 (1968). It cites numerous cases in support of its holding.

This Court teaches:

> "But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. . . . the deficiency may not be thus added to the rate base for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business." *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942).

The Eighth Circuit in speaking of the Commission made this statement: "There is no place in the proceeding for either the Commission or the Court to accord reparation." *State Corporation Commission of Kansas* v. *FPC*, 215 F.2d 176, 184 (1954).

What is forbidden by the Act is precisely what Petitioner is attempting to do here—i.e., recover in future rates allegedly past operating expenses. Petitioner appears to assume that the Federal Power Act guarantees it recovery of all costs incurred before or after it makes its rate filing. It is seeking to make the Commission a guarantor of its profitability, all at the expense of its jurisdictional customers. The Supreme Court has made it clear that Petitioner's assumption is altogether in error. It has said that the regulated company "cannot recoup its losses by making retroactive the higher rate subsequently allowed. . . . The company's losses in the first instance do not justify its illegal gain in the latter." *FPC* v. *Tennessee Gas Transmission*, 371 U.S. 145, 152-153.

Thus, even if the rate designated by Petitioner actually had left it with a deferred expense, which it could not recover, it still could not recoup that expense by excessive charges in the future covering past costs. Under the Federal Power Act, the utility must bear the responsibility and the risks of establishing its own forward-looking rates.

As made clear from both the Commission and Court of Appeals analyses, Petitioner's fuel clause contained in the 1973 contract covered the rate to be paid by the customer in the billing month. Although, since the cost of fuel for the billing month was not available at the time the bills were mailed, actual fuel costs for earlier months were used as the billing costs. There was no provision in the tariff obligating the customer to make any payments to Petitioner after the billing month. When bills were received and paid, the customer owed nothing further to the Petitioner. Any attempt subsequently to bill for expenses incurred prior to such billing, patently must constitute retroactive rate making, in its simplest form. The inconsistency of the Petitioner's position is made explicitly clear by this observation by the Court of Appeals:

> "The tariff required that an adjustment factor be 'applied to all kilowatt-hours supplied during the billing month.' This is inconsistent with the company's premise that the charge was to be a pass-on of *actual* past costs incurred. If that were the aim, then the billing should have been computed on the basis of the kilowatt-hours used during the month in which the fuel charges were actually incurred. If, as Jersey Central argues, it was collecting ac-

tual fuel costs on a deferred basis, the company would have had to defer collections for several billing periods before recovering costs for the preceding months. Only in this way could the company avoid inconsistency with the provision that the fuel adjustment factor was to 'be applied to each kilowatt-hour supplied under this tariff' and 'to all kilowatt-hours supplied during the billing month.'

"Moreover, the premise underlying the fuel adjustment charge was that the customer should bear the added expense caused by the increased costs of fuel. A customer whose usage fluctuated substantially from month to month, however, would pay more or less than his proportionate share if the usage amount were not the same in the billing month as it had been in the month when the fuel expense was incurred. And, as was argued in the *New Hampshire* case, if the clause authorized the company to recover actual past costs on a deferred basis, then customers newly entering the system would be paying for fuel charges incurred before they received service and customers leaving the system would avoid paying for fuel used for their benefit." [App. A, Petition, pp. 6a-7a].

Further evidence of the correctness of the Court of Appeals' reasoning is this fact pointed out by the Court of Appeals in footnote 4 at p. 7a of Appendix A to the Petition:

"'[4] The company concedes that it did bill customers for the fuel service charged in December of 1973 at the time the rate became effective, but now contends that was a mistake and it should have waited several months before imposing the extra charge for the actual costs. The language of the tariff is completely consistent with the conduct of Jersey Central in 1973, and the present contention

of the company cannot vary the plain wording of the tariff.'"

It should also be noted that the fact that Petitioner filed a new tariff in 1976 did not mean that it was obtaining any less revenues for fuel than it had obtained under the old tariff. The fuel clause in the new tariff was identical with the fuel clause in the old tariff, except it increased the base rate from 5.659 mills to 14.433 mills, which represented the existing cost of fuel per kWh at the time the new tariff was put into effect. With this substantial increase in the base rate, the fuel adjustment factor, which is the difference between the actual cost of fuel for the current period and the base rate, would become much smaller. Thus, the total revenues recovered for fuel would be identical under both rates. Moreover, the lag period in the new fuel clause was identical with the lag period in the old clause. Thus, the Petitioner would recover the identical revenues for fuel under the new clause as the old clause and there would be no unrecoverable amounts resulting from the new clause to be "phased-in" as the Petitioner argues.

II. There Is No Substantial Conflict of Decision

The Petition points out that the First Circuit in *Maine Public Service Co.* v. *FPC*, 570 F.2d 659 (1st Cir. 1978) vacated a Commission order which had declared unlawful a fuel clause adjustment surcharge provision. There, the Court ruled that the filed rate doctrine and the rule against retroactive rate making did not necessarily preclude the imposition of a fuel surcharge when the company involved was shortening the lag in its fuel adjustment clause. There are signi-

ficant differences between the situation as described by the First Circuit and the facts in this case. In the *Maine* case, Judge Campbell repeatedly emphasized that the problem was brought about by Maine Public Service Co.'s altering its fuel adjustment clause from a formula based on the previous 12 months, to one based on the one month prior to the billing month. Here the Petitioner has not altered its fuel adjustment clauses in any way other than merely to raise the base cost of fuel, and this alteration had no effect on revenues.

The basic reasoning in the *Maine* case is inapplicable here. The Court felt that the Commission, in the *Maine* case, had relied on the legal principles of the filed rate doctrine and retroactive ratemaking without examining properly the proposed surcharge to determine if it was in fact unjust and unreasonable. The Court indicated that it could be argued that the fuel clause contemplated that customers would have to pay the charge represented by the surcharge. The Court further stated that the surcharge could be likened to the continued operation of the old clause. Since these questions were unresolved, the Court felt that the mere application of the legal principles was premature. Thus, the Court ordered the Commission to re-examine the nature of the clause and then apply proper legal standards.

Although the First Circuit and Third Circuit are in disagreement to a limited extent, it would appear that with the remand to the Commission by the First Circuit, the results in both cases are most likely to be the same.

The Third Circuit is in complete agreement with the Fourth Circuit and the District of Columbia Circuit.

In *Virginia Electric & Power Co.* v. *Federal Energy Regulatory Commission,* 580 F.2d 710 (4th Cir. 1978), the Fourth Circuit took the position that the fuel adjustment clause did not provide for a recovery of past excess fuel costs but represented the orthodox use of test period to arrive at current costs. This is precisely what the Court of Appeals has done here.

In *Public Service Company of New Hampshire, et al.* v. *Federal Energy Regulatory Commission,* —— F.2d —— (Nos. 77-1592, 77-2004, 77-2005, 78-1329, 78-1330) (D.C. Cir., decided May 3, 1979), the Court was passing upon, among other fuel clauses, those of Pennsylvania Electric Company and Metropolitan Edison Company, which companies are affiliated companies of Petitioner. The fuel clauses of each of those companies was identical with the fuel clause of Petitioner. The Court affirmed the Commission's summarily rejecting the fuel surcharges proposed by the companies which surcharges were in substance the same as the Petitioner's "phase-in". In a lengthy opinion, the D.C. Circuit disposed of virtually each argument advanced by the Petitioner before the Commission, the Court of Appeals and here. The Court expressly held that the Commission correctly determined that the proposed surcharges of such sister companies of the Petitioner were "illegal retroactive rate increases."

It is respectfully suggested that, with the strong opinions in *Virginia Electric & Power Co.* and *New Hampshire, supra,* as well as by the Third Circuit in this case, compared to the qualified opinion of the First Circuit in *Maine,* there is reflected a situation

which does not constitute a substantial conflict of opinions meriting the granting of *Certiorari*.

III. There Is No Question of Law

As emphasized by the Court of Appeals, what it was deciding here was the proper construction of a tariff (contract) filed with the Commission. The question of the proper interpretation of a contract most emphatically does not merit *Certiorari*. Both the legal issue as to the prohibition of retroactive rate making by the Commission and the necessity for the Commission to follow the filed rate doctrine, are beyond question. Petitioner does not raise any question as to the validity of these rules. The issue here has to do solely with the proper interpretation of the tariff.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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